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No. 89-1691

IN THE
Supreme Court of the United States

SERENA DUNN, *et al*,
Petitioners,

v.

THE FLORIDA BAR, *et al*,
Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF CERTIORARI

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OCTOBER TERM, 1989

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1. The opposition of respondent Supreme Court of Florida* does not dispute that, in assessing petitioners' eligibility for fees, the Eleventh Circuit required petitioners to prove that they would have prevailed on the merits, even though the parties had previously entered into a stipulated dismissal. In fact, at numerous points in its opposition, respondent maintains that a trial court *must* decide as a matter of law whether the plaintiff vindicated an established constitutional or statutory right, and that the Eleventh Circuit properly engaged in

* By letter to the Clerk of this Court dated June 28, 1990, The Florida Bar and its President, James Fox Miller, waived their right to respond to the petition.

such an inquiry to decide the fee issue in this case. *See* Opposition at 12-13 (courts below were required to "make a legal determination...that the Petitioners were not prevailing because there existed no right" to the relief they claimed), 12 ("Petitioners had never established the fact that there even existed a constitutional right"), 18 ("no such constitutional or statutory right existed..."), 28 ("Court of Appeal[s] reached the conclusion that no such constitutional right existed", but if it "had found that such a constitutional right had been established,...Petitioners would have been entitled to fees as the prevailing party"), 29 (there must "exist[] a recognizable constitutional or statutory right").

The parties are thus in agreement that the Eleventh Circuit's analysis asked whether "in fact a constitutional ...right was violated." *Id.* at 37. While respondent demands this type of merits review, petitioners urge the standard embraced by a majority of the circuits, which would impose an easily discernible threshold of legal plausibility, thus dispensing with "the very trial which the settlement was intended to avoid." *Long v. Bonnes*, 455 U.S. 961, 966 n.3 (1982)(Rehnquist, J., joined by O'Connor, J., dissenting from denial of certiorari); *see also Maher v. Gagne*, 448 U.S. 122, 134 (1980)(concurring opinion of Powell, J.)(in awarding fees, court should not look behind the settlement of a substantial federal claim).

The Supreme Court of Florida's opposition, therefore, simply reinforces the existence of a split among the circuits and the necessity for this Court to resolve it.

2. Insisting that, in cases resolved short of adjudication, the court must decide whether the defendant's conduct was "required by law," respondent appears untroubled by a regime which necessarily

requires that opinions on the merits be issued in the context of resolving fee disputes. *See* Opposition at 35-37. By requiring such rulings in cases where settlement is reached, the court is compelled to give plenary consideration of the merits *after* the parties have affirmatively decided to do otherwise. This will force the courts to resolve important constitutional and statutory questions in a context possessing many of the attributes of advisory decision making. *Cf. Pierce v. Underwood*, 487 U.S. 552, 561 (1988)(review by the courts of appeals of attorney's fee decisions under the Equal Access to Justice Act's "substantial justification" standard should be deferential, because *de novo* review would "effectively establish the circuit law in a most peculiar, secondhanded fashion"); *Cooter & Gell v. Hartmax*, ___U.S.___, 110 S.Ct. 2447, 2460 (1990)(*de novo* review of district court decisions concerning the legal sufficiency of pleadings under Fed. R. Civ. P. 11 would "'strangely distort the appellate process'"), *quoting Pierce*, 487 U.S. at 561.

In short, what respondent argues is required—a definitive decision on the merits *after* settlement (Opposition at 35-36)—is precisely what *Maher*, *supra*, teaches is not the proper business of the federal courts which sit to decide actual "cases" or "controversies." This insistence on full adjudication as part of resolving a fee dispute in settled cases is a further reason why review should be granted.

Respectfully submitted,

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